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No. 165

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF BUREAU OF INFORMATION OF THE EASTERN RAILWAYS, THE ASSOCIATION OF WESTERN RAILWAYS, AND BUREAU OF INFORMATION OF THE SOUTHEASTERN RAILWAYS AS *AMICI CURIAE*

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The Bureau of Information of the Eastern Railways, the Association of Western Railways, and the Bureau of Information of the Southeastern Railways submit this brief as *amici curiae* in support of respondents, Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas, and ask that the judgment of the Court of Appeals for the Fifth Circuit be affirmed. In accordance with Rule 42 of this Court's rules, this brief is accompanied by the consent of the attorneys for both the petitioners and the respondents.

Interest of *Amici Curiae*

Amici curiae are associations of the majority of the carriers by railroad that employ persons defined as "em-

ployees" in Section 1 Fifth of the Railway Labor Act (45 USC § 151 Fifth). The members of these associations are subject to the Railway Labor Act.

The carriers belonging to these *amici* have entered into collective bargaining agreements with many labor organizations, including those that are parties in this case. In order to operate efficiently and remain competitive with the other forms of transportation, railroads must constantly make changes in their operations. If such changes may be enjoined by a court, ordinarily unversed in the terminology and customs of railroad labor relations, on the mere allegation that a contemplated change violates a provision of one or more collective bargaining agreements, efficient operations by carriers will be seriously hampered. Therefore, although *amici curiae* are not directly concerned with particular changes involved in the present case, they have a definite interest in the broad issue presented.

Question Presented

When a railroad makes changes in its operations which certain labor organizations claim violate collective bargaining agreements and the dispute is submitted to the National Railroad Adjustment Board, can a district court prohibit such changes pending decision by the Adjustment Board?

Summary of Argument

A. This case arose from a dispute as to whether certain operational changes made by respondent carriers were prohibited by their collective bargaining agreements with petitioners. The district court required respondents pending decision by the National Railroad Adjustment Board, to restore the *status quo* or to pay affected employees the same sums they would have earned had the changes not been made. The court of appeals reversed. In

Order of Conductors v. *Pitney*, 326 U.S. 561, this Court held that a carrier could not be enjoined from taking action allegedly in violation of a collective bargaining agreement, because primary jurisdiction to interpret such agreements was vested in the Adjustment Board, an agency which was peculiarly capable of handling these "minor disputes." Petitioners rely on a lone dissenting opinion in the *Pitney* case to the effect that the carrier should have been enjoined from taking action pending a decision by the Adjustment Board. However, this Court held otherwise, and the *Pitney* decision is therefore squarely opposed to petitioners' position here.

B. The district court's order was grossly inequitable, because it required respondents to pay the wages of ten unneeded employees even though it would be virtually impossible to recover these payments in the event that respondents' interpretation of their agreements is upheld by the Adjustment Board. On the other hand under the decision below petitioners are fully protected. If the Adjustment Board holds for them, it can award back pay to affected employees to compensate for losses in the interim upon the timely filing of time claims. Therefore, the traditional equitable power of a court to impose conditions before granting injunctive relief did not justify the district court's order. *Central Kentucky Co.* v. *Railroad Comm'n.*, 290 U.S. 264.

C. The Railway Labor Act contemplates that a railroad can act according to its interpretation of a contract until disputed questions of interpretation are finally settled. The Act makes specific provisions prohibiting the parties from making changes in agreements for specified periods in the case of major disputes (45 USC §§ 155, 156, 160), but nothing is said about keeping the *status quo* in minor disputes until the Adjustment Board reaches a decision on the

interpretation of an existing agreement. In fact, the procedure outlined in the Act for handling minor disputes contemplates that carriers will make changes alleged to violate agreements, and are free to do so until an award of the Adjustment Board against the carrier is judicially enforced. 45 USC § 153 First (i), (o) and (p); *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, 246 (C.A.D.C., 1941), affirmed by an equally divided Court, 319 U.S. 732.

ARGUMENT

A RAILROAD INVOLVED IN A DISPUTE OVER THE INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT MAY NOT BE PROHIBITED FROM MAKING OPERATIONAL CHANGES PENDING DECISION OF THE DISPUTE BY THE NATIONAL RAILROAD ADJUSTMENT BOARD.

This case involves a dispute over the meaning of various provisions in certain collective bargaining agreements. Respondents contend that they had the right to rearrange the assigned way-freight service between Wichita Falls, Texas and Forgan, Oklahoma, and to change the away-from-home terminals for unassigned crews in through freight service (R. 124-145). Petitioners assert the contrary and rely on provisions in their agreements which they claim prohibited such operational changes without their consent (R. 38-39). Therefore this is a typical "minor" dispute under the Railway Labor Act, §§ 2 Sixth, 3 First (i) (45 USC §§ 152 Sixth, 153 First (i)).[1]

This dispute has been submitted to the National Railroad Adjustment Board pursuant to the provisions of Section 3 First (i) (R. 116). Petitioners called a strike over the dispute although such strikes over minor disputes are prohibited by the Railway Labor Act. *Brotherhood of R.*

1. Petitioners contended below that this is a "major" dispute (R. 275, 280). See Petition for Certiorari 23-26. A major dispute is one involving a change in agreements as distinguished from a dispute over the interpretation of existing agreements. Neither respondents nor any of the petitioners have served notice of "an intended change in agreements," required by Section 6 of the Railway Labor Act (45 USC § 156) to inaugurate a major dispute. Neither respondents nor petitioners have ever in the course of this litigation manifested a desire to change their agreements. On the contrary, petitioners have consistently maintained, and respondents have denied, that the existing agreements prevented the rearrangement of service. Moreover, this Court limited its grant of certiorari to the first question presented in the petition for certiorari, so that any question as to whether this is a major or minor dispute is no longer at issue in the case.

Trainmen v. *Chicago River & Indiana R. Co.*, 353 U.S. 30. The district court enjoined the strike but ordered respondents to restore the *status quo* pending decision by the Adjustment Board or to pay affected employees the same sums they would have earned had the changes not been made (R. 90-92). The court of appeals reversed as to the requirement that respondents restore the *status quo* or make the optional alternative payments.

A. Petitioners' Position Is Contrary to this Court's Decision in Order of Conductors v. Pitney.

Petitioners argue that respondents' operational changes required renegotiation of their collective bargaining agreements and that respondents violated Section 6 of the Railway Labor Act (45 USC § 156) by putting the changes into effect unilaterally (Br. 28-29). If and only if petitioners' claim that their existing agreements prohibited such changes is correct, respondents would be required to negotiate a change in these agreements in order to undertake the desired action. But before a court could conclude that respondents were required to negotiate a new agreement under Section 6, the court would first have to interpret the existing agreements favorably to petitioners, and hold that they prohibited respondents' action. This cannot be done because primary jurisdiction to interpret collective bargaining agreements is vested in the National Railroad Adjustment Board, as this Court held in *Order of Conductors* v. *Pitney*, 326 U.S. 561. In the *Pitney* case, the Order of Railway Conductors sought a court order against the transfer of certain work to the Brotherhood of Railroad Trainmen on the ground that the transfer was a violation of the Conductors' agreement with the railroad. The Conductors argued that existing agreements precluded the contemplated change and that therefore the railroad could not transfer the work without complying with Section 6 of the Railway Labor Act. The Conductors' argument was rejected by this Court, which said:

". . . the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements. But the answers here specifically denied that the O.R.C. [Order of Railroad Conductors] agreements provided that road conductors operate the five trains in question. This put in issue the meaning of the contracts that allegedly embodied the working conditions which the trustees were about to change. The court, therefore, had to interpret these contracts before it could find that § 6 had been violated." 326 U.S. at p. 565.

The Court noted that "Congress has specifically provided for a tribunal to interpret contracts such as these in order to settle a labor dispute" and that the Adjustment Board is better equipped than the courts to pass on questions of contract interpretation:

". . . interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O.R.C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand." (Citations omitted.) 326 U.S. at pp. 566-567.

Mr. Justice Rutledge, dissenting in part, maintained that the *status quo* should be maintained by court order pending decision by the Adjustment Board. *Id.* at pp. 568-571. It is clear, therefore, that the very issue presently before this Court was raised and decided in the *Pitney* case. Petitioners rely heavily on the dissent (Br. 27, 29-30). But seven members of this Court took the opposite view[2], and for this Court to reverse the decision below it would have to overrule the considered and well-reasoned opinion of the majority in the *Pitney* case which has been reaffirmed in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, and in *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548.

Petitioners claim that the *Pitney* case supports their position because the Court there approved "that part of the order of the district court which instructed the trustees to recognize the Brotherhood of Railroad Trainmen's agreements" (Br. 19). But the carrier in the *Pitney* case was in bankruptcy and the part of the district court's order on which petitioners rely was issued as an exercise of the court's "jurisdiction conferred by the Bankruptcy Act to control its trustees so as to insure the preservation and proper administration of the debtor's estate." 326 U.S. at p. 565. The district court was thus acting in its capacity as "a 'carrier' within the meaning of § 1 of the Railway Labor Act." *Ibid;* cf. *In re Chicago Great Western R. Co.*, 17 F. Supp. 932 (N.D. Ill., 1937). The district court's order in the present case was of course not based on any such theory, since respondents are not in bankruptcy and do not need judicial approval of their business decisions as such.

The only other distinction between *Pitney* and the present case is the manner in which the question arose. Whereas in *Pitney* the Order of Railway Conductors initiated the

2. Mr. Justice Jackson did not participate.

court proceedings to enjoin the alleged violation of its agreement, in the present case the petitioners first called a strike in violation of the Railway Labor Act.

It is now well settled that if a minor dispute is submitted to the National Railroad Adjustment Board, a strike over the dispute may be enjoined. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.* 353 U.S. 30; *Norfolk & Portsmouth Belt Line R. Co.* v. *Brotherhood of R. Trainmen,* 248 F. 2d 34 (C.A. 4, 1957), certiorari denied, 355 U.S. 914; *In re Hudson & Manhattan R. Co.* 172 F. Supp. 329 (S.D.N.Y.), affirmed *per curiam,* 267 F. 2d 941 (C.A. 2, 1959); *cf. Manion* v. *Kansas City Terminal Ry. Co.* 353 U.S. 927; *Louisville & Nashville R. Co.* v. *Brown,* 252 F. 2d 149 (C.A. 5, 1958), certiorari denied, 356 U.S. 949. In none of these cases did the court hold or even suggest that the carrier must maintain the *status quo* when seeking an injunction against the strike. But in the present case, the district court's order required that respondents cancel the changes which they claimed they had a right to effect or to pay affected employees the same sums they would have earned had the changes not been made. Surely petitioners' resort to an illegal strike should not put them in a better position than they would be in had they followed the orderly procedure of the Order of Railway Conductors in the *Pitney* case. A reversal of the decision of the court of appeals would completely undermine the principle of the *Pitney* case, for labor organizations would then invariably call strikes in order to obtain judicial orders against a carrier's action alleged to be in violation of a labor agreement.

The *Pitney* decision is therefore controlling and should be followed under the principle of *stare decisis.* Even if the question were an open one, the result reached in that case and by the court below accords with equity, sound policy, and the principles and history of the Railway Labor Act. The same result was also reached by the Court of Appeals

for the Second Circuit in a similar case. *Baltimore & Ohio R. Co.* v. *United R. Workers*, 271 F. 2d 87 (C.A. 2, 1959).

B. The Order of the District Court Was Contrary to Established Equitable Principles.

Petitioners argue that the order of the district court was reasonable and in accordance with general equitable principles (Br. 14, 20). But a more thorough consideration of the equities reveals this is not so. The main basis for the dispute in the present case is the fact that under the rearranged freight service made possible by dieselization, fewer crews are required to operate trains between Wichita Falls, Texas and Forgan, Oklahoma. Altogether, ten positions have been abolished (R. 289). Let us suppose, *arguendo*, that the petitioners' construction of the contract is held to be the correct one by the National Railroad Adjustment Board. In that event any employee who has lost his job or suffered a reduction in pay by reason of the operational changes could be reinstated and his losses incurred prior to the Board's decision could be compensated by awards of back pay upon the timely filing of time claims by or on behalf of the affected employees.

On the other hand, let us suppose for the sake of argument that the respondent railroads are correct in their interpretation of the agreements and that the Adjustment Board holds that all along the M-K-T had a perfect right to make the changes involved. How then, under the order of the district court, could the respondents be recompensed for their interim losses in having to pay ten unneeded employees? Respondents would lose at least $140,000, for the district court's order would have required them to pay $35,000 annually (R. 302) and under petitioners' own calculations, four years will elapse before the Adjustment Board decides the dispute (Br. 26). Petitioners refused to

give respondents any bond for reimbursement of the amounts paid out in the event that respondents' interpretation of the contract proved to be correct, and the district court declined to order any such bond (R. 300-302). Cf. Rule 65(c) of the Federal Rules of Civil Procedure. If the Adjustment Board holds for respondents, shall the carriers endeavor to force the employees in question to return the pay they have received (and quite likely spent) over the past years? Such a result would be most undesirable, even if it were practicable for the respondents to be reimbursed in such a way, and would seriously disrupt labor relations. Moreover the Railway Labor Act provides for the enforcement of employees' money awards against carriers but makes no provision for a carrier's recovering money from an employee. See Section 3 First (p) (45 USC § 153 First (p)).

Petitioners suggest that if their interpretation of the contract is ultimately held to be correct, the payment of money by respondents to adversely affected employees pursuant to an Adjustment Board award will not be "adequate compensation" (Br. 26) because respondents' action will impair or sever "family, social and religious ties," etc. (Br. 10, 24). The district court made no findings as to the existence or extent of any loss to employees which could not be adequately compensated by an Adjustment Board award on timely filed claims of affected employees, nor is there any evidence in the record from which it could have made such a finding. The district court's order was obviously not designed to protect any "family, social and religious ties" from possible disruption since the order gave respondents the option to keep the desired changes in effect provided the affected employees were paid the sums they would have earned had the changes not been made (R. 91). Petitioners never objected to this feature of the district court's order, and even now they seek to have the order (including the

optional alternative payments) reinstated "in all respects" (Br. 32). Despite petitioners' appeals to family and religion, one must conclude that these considerations are distinctly subordinate to petitioners' interest in forcing respondents to pay large amounts of cash without hope of reimbursement.

The traditional equitable principles on which petitioners rely preclude rather than support the district court's order. That order was in effect a preliminary injunction because it required respondents to take action even though the court did not consider the merits of the contract dispute. A party seeking equitable relief prior to a determination of the merits of a dispute must show irreparable injury. *Schlosser* v. *Commonwealth Edison Co.*, 250 F. 2d 478 (C.A. 7, 1958), certiorari denied, 357 U.S. 906. The court must "regard the comparative injury which would be sustained by the defendant if an injunction were granted and by the complainant if it were refused." *Corica* v. *Ragen*, 140 F. 2d 496, 499 (C.A. 7, 1944); cf. *Ohio Oil Co.* v. *Conway*, 279 U.S. 813. In applying this "comparative injury principle" to the present case, the loss which respondents would sustain under the district court's order is greater than any harm to petitioners from leaving the changes in effect, for the injury to petitioners, if any, could be compensated for by awards on timely filed time claims but the injury to respondents in prohibiting the changes would not be. Moreover, Rule 65(c) of the Federal Rules of Civil Procedure requires that before a preliminary injunction may be issued, the applicant must give security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." No such security was given by petitioners (R. 300-302).

Therefore the traditional power of a court to impose equitable conditions on the issuing of an injunction, see

Inland Steel Co. v. *United States,* 306 U.S. 153, and *Federal Power Commission* v. *Interstate Natural Gas Co.,* 336 U.S. 577 (cited by petitioners' Br. 14), is no authority for the inequitable order of the district court. In both the cited cases an injunction had been sought against an order of an administrative agency and the court, while staying enforcement of the agency's order, had imposed conditions that assured that the sums involved pending its review would ultimately be paid to the rightful owners as finally determined. Respondents, on the other hand, did not seek to enjoin enforcement of a presumptively valid administrative decision but rather they sought to enjoin an illegal strike which would have foreclosed any administrative hearing. Moreover, the order of the district court did not protect all affected interests (cf. Pet. Br. 14) since no protection was afforded to the respondents.

The brief of the *amicus* Railway Labor Executives' Association ("RLEA") quotes a dictum from *Central Kentucky Co.* v. *Railroad Comm'n.,* 290 U.S. 264 (Br. 7-8), although the actual holding of the case is squarely opposed to their position here. In that case this Court, after stating the general equitable power to impose conditions on injunctions, noted that there are "limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief". 290 U.S. at p. 271. The petitioner had been granted an injunction against a confiscatory rate of 45¢ set by a regulatory commission only on condition that the petitioner pay over to the consumer everything in excess of a 50¢ rate found by the court to be reasonable. The imposition of such a condition was held to be erroneous because its "practical effect" was to deny petitioner relief unless it surrendered its claim to a higher rate and its right to have the rate determined by the appropriate authority. Pending a final determination both parties were fully protected by the impounding of petitioners' col-

lections in excess of the 50¢ rate. Therefore, the district court's order requiring that such excess be paid to the consumer "was not calculated to protect the rights of the parties pending . . . action by the rate-making body," but rather "would have involved the surrender of rights asserted by [petitioner] to the funds impounded". *Id.* at p. 273. So also in the present case, the payments to employees ordered by the district court were "not calculated to protect the rights of the parties pending action" by the Adjustment Board since petitioners were already fully protected by the power of the Adjustment Board to award back pay on timely filed claims. Rather the order involved the surrender of respondents' asserted rights without any protection whatever.

Not only would the order of the district court work an injustice in the present case if respondents' interpretation of the agreements turns out to be the correct one; it would also have unfortunate consequences in all future cases. If a carrier can be compelled to maintain the *status quo* in minor disputes if it seeks to enjoin a strike, labor organizations will be encouraged to make a practice of resorting to strikes in order to stop all operational changes. Even though a union had a worthless case on the merits of the contract dispute, it would have nothing to lose by calling a strike and requesting the court to stop the changes as a condition to enjoining the strike. The decision of the court of appeals, on the other hand, does not give carriers any incentive to take action which will probably be found to be a violation of a collective bargaining agreement. If a railroad discharges an employee or abolishes a position and the Adjustment Board holds that its action violated any agreement, the carrier will be liable for back pay on timely claims by affected employees. The RLEA states in its *amicus* brief that under the decision below "carriers can ignore their contractual obligations" with impunity if they are allowed to act unilaterally pending a

decision by the Adjustment Board. The RLEA claims the Board's action will "amount to only an academic exercise." "On the other hand," the RLEA argues, "the position of the District Court, which is supported by petitioners imposes no undue burdens on carriers." Br. 14-15. In fact, the very opposite is true, since the Adjustment Board has power to award back pay to employees upon the timely filing of time claims whereas it is impossible for carriers to recover money paid to employees. Therefore, the Board's awards in favor of employees are not an "academic exercise", and carriers cannot "ignore their contractual obligations" with impunity. On the other hand if the decision below is reversed, labor organizations would be encouraged to violate their contractual obligations because of the impossibility of recovering money paid to employees. Adjustment Board awards favorable to carriers would be ineffective to recompense a carrier for losses pending the decision of the Board. This result would impose an unfair burden on carriers, whereas the decision below is entirely fair to employees and labor organizations.

Petitioners suggest that a district court's power to order maintenance of existing conditions is discretionary and could be withheld if the unions' claim is "frivolous" (Br. 30). But a district court cannot determine whether a particular claim is "frivolous" without an understanding of the contract and a knowledge of the peculiar customs and vocabulary of railroad labor relations. "Provisions in railroad collective bargaining agreements are of a specialized technical nature calling for specialized technical knowledge in ascertaining their meaning and application." *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 553. Therefore, the reasoning of the *Pitney* case and those following it does not merely limit the discretion of a trial judge. "This reasoning equally supports *a denial of power* in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." *Slocum* v.

Delaware, L. & W.R.Co., 339 U.S. 239, 244 (Emphasis supplied).

C. The Railway Labor Act Allows Carriers to Change Conditions Pending Adjustment of Minor Disputes.

The reversal of the district court's order was required by traditional equitable principles and by the decision of this court in *Order of Conductors* v. *Pitney*, 326 U.S. 561. Moreover, the district court's prohibition on changes pending adjustment of minor disputes is inconsistent with the history and total scheme of the Railway Labor Act.

One of the predecessors to the present Railway Labor Act was the Erdman Act passed in 1898. This statute provided for mediation of all controversies and for voluntary arbitration if mediation failed. No distinction was made at that time between major and minor disputes. Section 3 of the Erdman Act provided that if a dispute was submitted to arbitration, "pending the arbitration the status existing immediately prior to the dispute shall not be changed." 30 Stat. 424.

No such provision appeared in the Railway Labor Act of 1926 which set up the current system of differing treatment for major and minor disputes. However, a comparable idea was contained in two Sections. First, Section 10 gave the President power to create an Emergency Board to investigate a dispute which threatens to disrupt commerce substantially. Section 10, which was not subsequently amended, states:

> "After the creation of such [Emergency] board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." 45 U.S.C. § 160.

This provision maintaining the *status quo* only goes into effect if an Emergency Board is created. Existing "rates

of pay, rules, and working conditions" prior to the creation of an Emergency Board were protected by Section 6 of the 1926 Act. In 1926, the relevant portions of Section 6 read as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules or working conditions. . . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Board of Mediation have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 5 of this Act, by the Board of Mediation . . ." 44 Stat. 582.

This section, with its prohibition of changes pending action by the Mediation Board, was intended to apply only to major disputes, where the carrier sought to effect a change in agreements. Section 2 of that Act set up two different procedures to be followed in initiating major and minor disputes. A procedure was prescribed in Section 2 Fourth for "a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements" (*i.e.*, a "minor" dispute). Nothing was said in that Section about maintaining the conditions out of which the dispute arose.

In contrast, Section 2 Fifth of the 1926 Act stated that "Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto."

The scope of Section 6 was made clear in the 1934 Amendments to the Railway Labor Act. Section 2 Fifth (which was renumbered Section 2 Seventh) was changed to read:

> "No carrier . . .shall change the rates of pay, rules or working conditions of its employees as a class, *as em-*

> *bodied in agreements except in the manner prescribed in such agreements or in section 6* of this Act." (45 USC § 152 Seventh.) (Emphasis added.)

The words "in agreements" were added to the first sentence of Section 6 which now reads:

> "Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions . . ." (45 USC § 156.) (Emphasis added.).

The references to changes in agreements added to the two Sections in 1934 make it apparent that the prohibition on changing existing conditions in Section 6 does not apply to minor disputes. A change in working conditions which is not prohibited by existing agreements and thus does not involve a change *in agreements* is not governed by Section 6. Minor disputes, involving the interpretation of existing agreements, are governed by Section 3. This Section says nothing about maintaining existing conditions pending adjustment of a minor dispute. Moreover, even if Section 6 were applicable to the dispute in this case, the prohibition against changing conditions in that Section would not support the order of the district court which required respondent to restore existing conditions until the dispute was decided by the Adjustment Board. Section 6 only requires a carrier to preserve the *status quo* until the Mediation Board has acted. The last sentence of Section 5 First extends existing conditions for another 30 days (45 USC § 155 First). The Mediation Board withdrew from the present case over a year ago since it was of the opinion that this dispute was not subject to mediation under the Act (R. 51).

It may be seen then that when Congress wished the *status quo* to be preserved in railway disputes it specifically so provided and these specific provisions are meant to apply only to major disputes and only for limited periods. The "highly selective manner in which Congress has pro-

vided for" the preservation of *status quo* is strong evidence that changes pending the adjustment of minor disputes are allowed by the Act. Cf. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 305.

An examination of the usual procedure for handling minor disputes as contemplated in the language of Section 3 also demonstrates that carriers are free to make operational changes pending adjustment of minor disputes under the Railway Labor Act. The language of the statute does not set out all the details in this procedure, but refers to the "usual manner" for handling grievances in labor-management relations.

An authority on the practice of collective bargaining has noted that in the handling of grievances:

> ". . . the employer is the "acting" party, and the union is the "watchdog" or "policing" party . . . Thus, for example, if an employee refuses to obey an instruction of a supervisor, the employer does not file a grievance against the employee seeking to establish its right to take disciplinary steps against the employee or to determine the degree of discipline. It proceeds to discipline the employee, and if the union or employee disagrees with the employer's action, a grievance may then be filed on behalf of the employee contesting the imposition of the discipline or perhaps protesting the degree of the discipline." Torff, Collective Bargaining (1953) pp. 291-292.

Grievances customarily grow out of unilateral action on the part of the employer to which the union may object. This process differs from the initiation of contract changes where the party desiring the changes first serves notice, and the desired change is discussed prior to being put into effect. Section 3 First (i) of the Railway Labor Act states that minor disputes "shall be handled in the usual manner up to and including the chief officer *of the carrier* designated to handle such disputes." (Emphasis

added). This phrase contemplates that the union files objections to a carrier's action, and, if objections are denied, appeal to a higher officer of the railroad follows. The terminology used does not contemplate a procedure whereby a carrier must seek permission to effect operational changes by going through channels within a labor organization. In other words it is recognized that the power of initiating action rests with management.

During the Hearings before the House Interstate Commerce Committee which preceded the adoption of the 1934 Amendments to the Railway Labor Act, George Harrison, the chief spokesman for labor organizations at these hearings, described the nature of minor disputes in terms which make clear that they are initiated by management action. A minor dispute, he said:

> "may very well concern the separation of an employee from the service, whether or not he *has been* injustly dismissed. It may very well concern the promotion of a man, whether he *should have been* accorded promotion, in accordance with his ability and his seniority in keeping with the rules of the contract; whether or not he *was* laid off in his seniority order; if he *had not been* taken back in his seniority order." Hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess., p. 80 (1934). (Emphasis added.)

The reference is always to management action already taken which provoked a controversy. Mr. Harrison's description is totally inconsistent with a theory that minor disputes begin with a proposal by a carrier to take action which must be postponed until the controversy over the meaning of the contract is settled.

This power in management to take action is also implied by the provisions in Section 3 for enforcement of awards of the Adjustment Board. Section 3 First (o) requires the Board to "make an order, *directed to the carrier,* to make the award effective and, if the award includes a require-

ment for the payment of money, to pay the employee the sum to which he is entitled". (Emphasis added.) The assumption is that the carrier remains free to take unilateral action until a Board "order directed to the carrier" commands otherwise. The Board's order is not directed "to the employee", and it is an *"order"*, not a permission to the carrier to make a change which has been held in abeyance pending the Board's decision.

Section 3 First (p) provides for court enforcement by an employee "if *a carrier* does not comply with" an order of the Adjustment Board. The Act contemplates that the carrier is free even to refuse to comply with an unfavorable award of the Adjustment Board after it has been rendered until the award is enforced in court. In fact, it is only by ignoring the Board's award that the carrier can obtain judicial review of it. A railroad may not anticipate the employee's enforcement suit under Section 3 First (p) by bringing an action for a declaratory judgment to have the award reviewed in court. *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235 (C.A.D.C., 1941), affirmed by an equally divided Court, 319 U.S. 732.[3] As a corollary to this rule, the court noted:

> "The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights it can maintain the existing practices. . . ."
>
> ". . . The carrier is at full liberty to accept and comply with the award, or to reject and disregard it." 124 F. 2d at p. 246. See also *In re Chicago Great Western R. Co.,* 17 F. Supp. 932 (N.D. Ill., 1937).

Thus a carrier retains the power at all times to control its practices until a court orders enforcement of an award by

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3. Justice Rutledge did not participate in this Court because he was the author of the opinion below.

the Adjustment Board. Surely it would be incongruous to hold that a railroad must maintain existing conditions in a minor dispute but if the Adjustment Board decides against it the carrier is then free to act as it sees fit! Nevertheless such an illogical procedure would be required by the decision of the district court.

CONCLUSION

Respondents cannot be required to freeze their current operating practices just because certain changes are alleged to violate agreements with petitioners. The district court's order requiring such a freeze was contrary to the procedures contemplated by the Railway Labor Act, as well as inequitable, and was contrary to this Court's decision in *Order of Conductors* v. *Pitney,* 326 U.S. 561. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

The Railway Labor Act provides in pertinent part:

(1) Provisions applicable to minor disputes:

§ 2 Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties (45 USC § 152 Sixth).

§ 3 First (i). The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes (45 USC § 153 First (i)).

§ 3 First (o). In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named (45 USC § 153 First (o)).

§ 3 First (p). If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises.* * * (45 USC § 153 (p)).

(2) Provisions applicable to major disputes:

§ 2 Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act (45 USC § 152 Seventh).

§ 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its

services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board (45 USC § 156).

§ 5 First. • • • If arbitration at the request of the [Mediation] Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose (45 USC § 155 First).

§ 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. • • • Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

• • • •

After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose (45 USC § 160).